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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

JOSEPH STECHLER; GAIL STECHLER; AND STECHLER & CO., INC. F/K/A JOSEPH STECHLER & CO., INC.,	**Civ. Action No. 2:05-cv-03485-HAA-GDH**
PLAINTIFFS,	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REMAND**
v.	
SIDLEY AUSTIN BROWN & WOOD, L.L.P.; R.J. RUBLE; ALPHA CONSULTANTS, INC.; ALPHA CONSULTANTS, L.L.C.; IVAN ROSS; IRWIN ROSEN; GRANT THORNTON, L.L.P.; GRANT THORNTON INTERNATIONAL; ISRAEL PRESS; REFCO CAPITAL MARKETS, LTD.; AND REFCO CAPITAL LLC,	**HON. HAROLD A. ACKERMAN, U.S.D.J.** **Return Date: September 26, 2005**
DEFENDANTS.	

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. ARGUMENT AND AUTHORITIES 1
A. FEDERAL QUESTION JURISDICTION DOES NOT EXIST IN THIS CASE 1
III. CONCLUSION 6

TABLE OF AUTHORITIES

FEDERAL CASES

Broder v. Cablevision System Corp., 418 F.3d 187 (2d Cir. 2005) 8

In re Zyprexa Products Liability Litigation, 375 F. Supp. 2d at 170 7

STATE CASES

Employers-Shopmens Local 516 Pension Trust v. Travelers Casualty and Surety Company of America, No. 05-444-KI, 2005 WL. 1653629 (D. Or. July 6, 2005) 7, 8

Municipality of San Juan v. Corporacion Para El Fomento Econo Mico de la Ciudad Capital, No. 04-2303, 2005 WL. 1644942 (1st Cir. July 14, 2005) 7

DOCKETED CASES

Maletis v Perkins & Company, et al., Case No. 05-820-57 (September 13, 2005) 6

Sheridan v. New Vista, LLC, et al., Case No. 1:05-cv-428 (August 30, 2005) 5, 6, 8

FEDERAL STATUTES

47 U.S.C. § 543(d) 9

28 U.S.C. §§ 1331 4

Come now Plaintiffs[1] and file their Reply in Support of Plaintiffs' Motion to Remand, in response to certain of the contentions made in Sidley Austin Brown & Brown LLP's Opposition to Plaintiffs' Motion to Remand ("Defendants' Memorandum"), and would respectfully show as follows:

I. INTRODUCTION

The Defendants' Memorandum responds to the issue of whether removal jurisdiction exists under 28 U.S.C. §§ 1331 and 1441(a). For the reasons set forth herein and in Plaintiffs' Prior Brief, the Brown & Wood Defendants' arguments should be rejected and this cause should be remanded to the state court from which it was removed.

II. ARGUMENT AND AUTHORITIES

A. FEDERAL QUESTION JURISDICTION DOES NOT EXIST IN THIS CASE

The Brown & Wood Defendants are simply wrong. Federal question jurisdiction does not exist in this case. To establish such jurisdiction, in the absence of a federal cause of action (none was plead by the Plaintiffs), the Brown & Wood Defendants must show (i) that issues of federal law must necessarily be determined in this case such that the Federal Government has a serious interest in its outcome and (ii) that the exercise of federal jurisdiction over this case is consistent with the balance between congressionally approved federal and state judicial responsibilities. Stated differently, the questions to be determined are whether any federal issues that must be decided are substantial and contested and whether Congress intended for negligence actions involving standards of federal law to be decided in federal courts.

[1] All definitions and terms utilized will be the same as in Plaintiffs' Brief in Support of Motion to Remand ("Plaintiffs' Prior Brief"), unless otherwise indicated.

As an initial matter, despite the Brown & Wood Defendants' assertions to the contrary, the holding in *Sheridan* is sound.[2] (*See Sheridan v. New Vista, LLC, et al.*, Case No. 1:05-cv-428 (August 30, 2005) (attached hereto as Exhibit "A")).[3] In *Sheridan*, Judge Gordon J. Quist granted a motion to remand holding that:

> [U]nlike the claim in Grable & Sons, Plaintiffs' claims [based on a tax shelter and the failure to disclose the same IRS Notices relied on in this case] do not call into question the proper interpretation of federal tax law, but rather concern the reasonableness of Defendants' interpretation of federal tax law, *i.e.*, whether Defendants knew or should have known that the Strategy was invalid under federal tax law. In other words, even if Plaintiffs are correct that the Strategy was improper and illegal as set forth in IRS notices or regulations, the relevant inquiry, as Plaintiffs allege…, is whether Defendants were aware of or should have been aware that the strategy was invalid.

Sheridan at 7. Further, when addressing the issue of division of labor between state and federal courts, Judge Quist held that:

> The possible consequences of federal jurisdiction in this case are much more broad [than *Grable*]. …there is nothing to distinguish this case from fairly routine state law malpractice claims against attorneys, accountants, or other professionals based upon an unreasonable interpretation of federal tax or securities law. The potential for shifting the division of labor from state to federal courts is much greater in this case because if federal jurisdiction exists here, any malpractice, breach of fiduciary duty, or similar state law claim alleging an unreasonable interpretation of federal law, be it tax, securities, ERISA, etc. would invoke federal question jurisdiction. The mere presence of a federal issue should not produce such a result.

Sheridan at 8.

Indeed, Judge Quist held that through his own research he had found that "a defendant's unreasonable or unsupportable interpretation of federal law generally do[es] not present a federal question or 'arise under' federal law." *Sheridan* at 8-9. Ultimately, Judge Quist ruled that "Plaintiffs' claims arise under state law, and the fact that those claims may present questions of federal tax law is not sufficient to present a substantial federal question." *Id.* at 10.

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[2] *Sheridan* involved a nearly identical factual situation to the one at hand.

[3] The *Sheridan* case was removed to the same district from which the *Grable* case originated.

Similarly, recent Findings and Recommendations by a Magistrate Judge in the United States District Court of Oregon further confirm the soundness of Plaintiffs' position. *See Maletis v Perkins & Company, et al.*, Case No. 05-820-57 (September 13, 2005)(attached hereto as Exhibit "B").

In *Maletis*, another case factually similar to the one at hand, Judge Janice M. Stewart recommended the granting of plaintiffs motion to remand finding, among other things, that, "no substantial and disputed question of federal law suffices to give rise to federal question." *Maletis* at 14. Specifically, Judge Stewart found "[t]he fact that the nature of the advice allegedly given to plaintiffs involved judgments about the interpretation of federal tax law does not automatically convert those state law claims into ones involving substantial and contested federal issues." *Id.* at 17.

Further, Judge Stewart distinguished the situation in *Maletis* from *Grable*, finding that the plaintiffs in *Maletis,* unlike the parties in *Grable,* had settled their dispute with the IRS. Put another way, the *Maletis* plaintiffs no longer were in dispute with the IRS over any substantial federal questions arising from the tax code. Further, Judge Stewart reiterated Plaintiffs' concerns here regarding the opening of the floodgates of litigation in Federal Court. Judge Stewart found that, "opening the doors of federal courthouses to cases alleging these types of state law claims for giving faulty or fraudulent advice premised upon a misapplication of federal tax laws would inundate the federal courts with otherwise garden variety tax claims." *Maletis* at 16.

Other decisions decided after *Grable* also illustrate Plaintiffs' arguments regarding its inapplicability here. In *Municipality of San Juan v. Corporacion Para El Fomento Econo Mico de la Ciudad Capital*[4] and *In re Zyprexa Products Liability Litigation*,[5] the courts did apply

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[4] No. 04-2303, 2005 WL 1644942 (1st Cir. July 14, 2005)

[5] 375 F.Supp.2d 170 (E.D.N.Y. July 1, 2005).

Grable to uphold federal question jurisdiction on *the facts before them.* Significantly, however, both cases involved the use of *federal* funds, causing the U.S. Government to have a substantial interest in the outcome of those cases. As the First Circuit said, "[b]ecause the propriety of COFECC's conduct turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, *and the funds at issue are federal grant monies*, we agree with the magistrate judge and district court that jurisdiction is proper." *Municipality of San Juan*, 2005 WL 1644942 at *4, n. 6 (emphasis added). Likewise, the Eastern District of New York found federal jurisdiction because the case involved "substantial federal funding provisions" and "a core of substantial issues more federally oriented than those in *Merrell Dow*." *In re Zyprexa Products Liability Litigation*, 375 F.Supp.2d at 170.

Unlike these two cases, the present case does not involve federal funds nor does it involve any issue that the United States Government has a substantial interest in, given that the Plaintiffs have already settled with the IRS.

In addition to the recent *Sheridan* and *Maletis* decisions, another recent decision also concludes that there is ***no*** federal jurisdiction in a post-*Grable* case. *See Employers-Shopmens Local 516 Pension Trust v. Travelers Casualty and Surety Company of America*, No. 05-444-KI, 2005 WL 1653629 (D. Or. July 6, 2005). In *Employers-Shopmens*, the court addressed the issue of whether the federal court's jurisdiction was preempted by ERISA when the plaintiffs were three ERISA trusts. While the plaintiffs argued that the only appropriate analysis was the applicability of ERISA preemption, the defendants contended that the issue was whether certain bonds issued complied with ERISA and that the case thus involved substantial issues of federal law. *Employers-Shopmens Local 516 Pension Trust*, 2005 WL 1653629 at *5. The court looked to *Grable* for guidance: "The Supreme Court recently noted the constant refrain in substantial federal question cases that federal jurisdiction 'demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.'" *Employers-Shopmens Local 516 Pension Trust, 2005 WL 1653629 at *6* (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* __ U.S.___, 125 S.Ct. 2363, *4 (2005)). Finding that the plaintiffs' claims were based on the purchase of bonds and not on the existence of ERISA plans, the court found that "[t]he ties between the claims and the [ERISA] plans are too tenuous" and do not "require their resolution in federal court." *Employers-Shopmens Local 516 Pension Trust*, 2005 WL 1653629 at *7. While certainly factually distinguishable, *Employers-Shopmens* is nonetheless relevant here for two reasons:

1. First, *Employers-Shopmens* demonstrates that *Grable* does not, as one might be lead to believe from the Brown & Wood Defendants' argument, hold that any case that mentions the words "IRS" or "federal" involves a federal question and belongs solely in federal court.

2. Second, the case's discussion of the ERISA pre-emption issue is a prime illustration of the vitality of the second prong of the test laid out in *Grable—i.e.*, that jurisdiction over the matter must be consistent with Congressional judgment about the sound division of labor between state and federal courts. Here, the absence of a federal cause of action, coupled with the massive amount of litigation that would shift from state to federal courts—*i.e.*, all negligence cases where the standard of care or underlying dispute had reference to federal law—strongly argues (as the *Sheridan* and *Maletis* courts found in this same context) in favor of this Court exercising a "veto" over any federal jurisdiction that it may otherwise find exists.

Finally, the Brown & Wood Defendants' heavy reliance on the *Becnel* and *Broder*[6] cases is misplaced.[7] First, the *Becnel* case, decided in a court in the Western District of Arkansas, is not controlling authority for this Court and need not be followed.[8] Second, the *Becnel* case discusses in conclusory terms the first of the two tests set forth in *Grable* (whether a substantial

[6] *Broder v. Cablevision Sys. Corp.*, 418 F. 3d 187, 195-96 (2d Cir. 2005).

[7] In *Sheridan,* Judge Quist disagreed with and declined to follow *Becnel. Sheridan* at 10-11.

[8] Admittedly the same is true of *Sheridan* and *Maletis*, which is only a recommendation of the Magistrate Judge at this point.

contested federal question exists) and does not discuss the second one (whether there is an appropriate division of labor between federal and state court) at all. With all due respect, the *Becnel* court just got it wrong and this Court should not follow the decision. *Broder* is inapplicable here because it involved a case where the federal court retained jurisdiction simply to dismiss the claims at issue. Moreover, the *Broder* court retained jurisdiction because it found that the case involved the assertion of a private right of action under federal law, specifically 47 U.S.C. § 543(d). Here, Plaintiffs have not asserted such a right of action.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' Prior Brief, Plaintiffs respectfully request that this Court GRANT their Motion to Remand and remand this case to State court.

Respectfully Submitted,

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